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Ethical dilemmas? UK immigration, legal aid funding reform and case workers

Evan Killick and Deborah James *Anthropology Today* 26(1):13-15.

Anthropologists have an abiding concern with migrants' transnational movement. Such concern confronts us with some sharp ethical dilemmas.¹ Anthropologists have been intensely critical of the forms of law applied to both asylum seekers and potential immigrants, drawing attention to its 'patchy' and 'paradoxical' character (Andersson 2008). One way to behave ethically, enjoins barrister Kathryn Cronin (2008), is for anthropologists to act as expert witnesses in cases of asylum; an experience about which Tony Good (2007) has written instructively, in part on the basis of his own experiences in this role. Justice as administered in the asylum courts, Good shows, is increasingly dominated by technical procedures and statistical calculus: these substitute for law as normally understood (*ibid.*: 257; for France see Fassin 2005, for the US see Coutin 2007).

A particularly chilling aspect of such processes, and testimony to the increasingly 'technical' character of the law in such settings, is the way migration controls have been 'externalized' (Andersson 2008, Haddad 2008, Hyndman and Mountz 2008) and the border 'exported' (Gibney and Hansen 2003). The British, in common with many other governments, increasingly demand that individuals make visa and immigration applications overseas before setting foot in the country, enabling bureaucrats or officials not always directly related to the UK government to turn down such applications. Anthropologists and other scholars have, once again, been understandably critical of such changes. But we will face a dilemma when we are forced to go beyond mere condemnation and instead asked to help implement such processes. Lecturers at UK universities and colleges will be required in future to inform the Border Agency if students fail to enrol or miss more than ten sessions,² thus – as many have protested – effectively becoming surveillance agents of the state, but now operating at its 'inner' rather than 'externalized' frontiers.³

Legal aid case workers are faced with similar dilemmas in the course of their work with asylum seekers and immigrants. Recent UK reforms to funding, allegedly introduced in order to increase the efficiency of legal aid and its ability to deliver 'value for money', have in some cases changed the provision of legal advice into an increasingly administrative and technical procedure, and have simultaneously encouraged legal aid case workers to become agents of this internal border. The changes, characterized in a 2008 article by columnist Madeleine Bunting⁴ as 'an ideologically-driven marketisation of a crucial part of the welfare state', that threaten to penalize 'the poorest and most vulnerable members of society', have been condemned by Bunting and other commentators for making access to justice increasingly uneven rather than being universally available as the original spirit of legal aid presumes it should be.

This tightening in the provision of funds, we suggest, both threatens the continued existence of many of the UK's Law Centres, non-profit organizations that offer legal advice, and attempts to force caseworkers into a surveillance role, complementing or anticipating the judgments of the Home Office and its Border Agency. The caseworkers with whom we worked find themselves caught in the middle between these ever increasing financial pressures and their ethical obligations to their clients. They are faced with contradictory imperatives. 'Value for money' demands that they check up on opportunist and possibly deceitful clients and even prejudge the probable outcomes of cases, but it is their ethical duty to advise and represent people in need.

Individual case workers do not necessarily yield to this pressure to complement Home Office procedures and to act as its agents. Instead, their work represents a complex intersection of processes, both reshaping clients' behaviour and experience to bring them into line with Home Office specifications, and simultaneously

challenging Home Office inconsistencies on their clients' behalf to modify its often arbitrary decisions in accordance with fair and ethical practice.

Case workers and legal aid funding reforms

Law Centre caseworkers, who play a key role in making the legal system accessible to applicants, are drawn from a range of backgrounds. Some formerly worked for NGOs or government departments dealing with immigrants, but moved to the SWLLC in order to utilize their skills in a more effective and engaged manner. Others had a more formal legal education and switched to work in legal aid, in part to gain experience but usually in the conviction that their work here – specifically in asylum and immigration – would be more rewarding than that in the corporate or private sector. All have a commitment, a belief in the importance of what they are doing, but many have begun to talk of disillusionment with the system and weariness of the increasing pressures to work faster and deal with more clients, with a concomitant diminution in the quality of the advice and service they can offer.

While it is the complex and demanding cases that inspire and challenge case worker Ana,⁵ the funding changes outlined above have begun to discourage her from taking these on. She talks of finding alternative work that would at least be better paid, if not as interesting. Another case worker, Tamara, after putting heart and soul into her work, had recently resigned, unable to deal with the responsibility of helping desperate and vulnerable people without having the time and resources to do an adequate job. While some case workers might be 'long-stayers' who could cope with the pressure, few, she said, would be able to continue working under such circumstances in the long term. Her commitment to face-to-face contact and round-the-clock service to people in trouble, we were told by SWLLC's director, was unsustainable. While appreciated by individual clients, such single-mindedness can generate dissatisfaction from those expecting similar levels of dedication across the board; it also leaves little time to deal with 'the billing' or 'the administration'.

These latter, however, are key components in a system which seeks greater efficiency: the funding reforms make it imperative that the minutiae of 'billing' and 'administration' are attended to so that the centres can continue to run. Payment is now given in chunks of specific size rather than being allocated on the basis of the time spent on a case, and a differentiation is established between cases focused on short and simple 'acts of assistance' and those which are more complex and hence best avoided. A core element of SWLLC's funding comes from the UK's Legal Services Commission (LSC), which administers it in compliance with strict new criteria relating to income and assets. All clients are required to prove their financial eligibility before any advice is given. Replacing the old system of remunerating SWLLC for the exact amount of time spent on a case (including 30 minutes of advice to all applicants), eligibility is now confirmed beforehand and funding awarded on a 'threshold' basis.

To reach the 'first threshold', eligible cases are paid an initial flat fee of £260 – representing four hours and 26 minutes of caseworker time. A case deemed to 'merit' the extra time involved, by reference to its presumed (more than 40% chance of) success and after authorization from the LSC, may proceed to the next threshold of £765. But anything inbetween is, in effect, unreimbursable, losing money for SWLLC. The effects are evident in the proportions of time devoted to different activities in practitioners' relationships with clients, with the calculation of funding frameworks receiving more attention than previously. The first meeting takes the form of a financial eligibility test, after which advice – up to the 'first threshold' – may be offered or refused. Subsequent calculations of cost are equally crucial.

Funding reforms do not, of course, serve only to constrain. Madeleine Bunting's repudiation of the 'value for money' mantra perhaps obscures the genuine reasons why these changes were deemed necessary. They were intended to modernize and incentivize, by eradicating unnecessary duplication of services⁶ and by tackling the

unscrupulous practices of solicitors in certain private law firms, some of whom are said to have been using public legal aid funding unaccountably, even absconding with the money and leaving needy or desperate clients in the lurch. But however worthy the intentions, funding cuts – at least in the case of the Law Centres with which we have contact – appear to be undermining universal access to expert legal advice: a vital element in personalizing what can otherwise be a dehumanizing bureaucracy.

Case worker and client⁷

In February 2008 Elizabeth, a 22 year-old woman from Ghana, came into one of SWLLC's branches in south London to ask for advice. After proving that she had no income of her own and was thus eligible for legal aid, she explained her position to the caseworker, Ana, who decided that the case was eligible since it complied with the specifications governing the 'first threshold'. Elizabeth explained how she had come to the UK on a settlement visa five years earlier to join her parents, who were settled in the UK. Having been 17 years old when she applied, she was granted indefinite leave to remain as a dependent child. She had now come to ask advice about bringing her own six-year-old daughter to the UK because her daughter's father, who had been caring for the child in Ghana, had recently died.

'Deception', the caseworker quickly ascertained, constituted the central problem in this case. The form that Elizabeth originally signed when applying to join her parents who had already settled in the UK must have included the declaration, following Rule 297(iii), that she had not formed her own 'independent family'.⁸ The existence of a child, had it been revealed, would have proved to the Home Office that she had, indeed, formed such a family. Disclosing the presence of her daughter to the Home Office at this later stage would signal that Elizabeth's original status of resident in the UK had been based on falsehood, making her vulnerable to possible deportation.

Given the funding reforms, such a case needed to be carefully assessed. The caseworker discussed the possible steps that Elizabeth could undertake in order to make a claim, including undergoing DNA tests to prove the child was hers, providing the father's death certificate, and offering proof that she had been supporting the child by sending money to Ghana. The claim, she emphasized, had little chance of success, not only because of Elizabeth's original deception of the Home Office but also because she did not have the resources to look after her child in the UK without recourse to public funds. Potential alternatives were considered, including the possibility of Elizabeth's mother sponsoring the child. Here, however, the caseworker noted the Home Office's suspicion of such arrangements, particularly strong in the wake of the case of Victoria Climbié, who was abused and murdered by the great-aunt who had brought her to the UK from Ivory Coast. Elizabeth would need to move back in with her parents, said the caseworker, to make such sponsorship possible. Overall, given the difficulties of Elizabeth's case, the caseworker decided – as expressed in the words of the official letter that she composed after the meeting and before closing the file – that 'although there are compassionate features in your case, these may be overridden by the fact that you used deception to obtain your current visa. [...] I must be satisfied that there are enough merits, i.e. prospects of success, in your case. It is my opinion that, for the reasons mentioned above, your child's application is likely to be refused'. [close up gap – the next sentence should follow on]SWLLC was able to claim the full basic amount, £260, from the LSC to pay for an hour's consultation, a further hour to write the advice letter – plus a contribution to the costs of filling in all the paperwork required by the LSC!

The summary account of Elizabeth's case and Ana's official reaction to it, however, obscures a more complex personal exchange. As the consultation progressed and Ana emphasized the barriers to pursuing the claim, Elizabeth became increasingly distressed, trying to explain her earlier fear of telling her parents about her baby before her arrival in the UK, and stressing how crucial it was that, given the lack of immediate family in Ghana,

she now be reunited with her daughter. Currently disabled and walking with a crutch, she pointed to the impossibility of her returning to Ghana to care for the child there, but the case worker said that she had little option but to stick to the letter of the law. She remarked to us, later, that under the previous system of funding she would have been inclined to take the matter on, perhaps under the general legal aid funding scheme. [close up gap – the next sentence should follow on]

A case could have been made, for example, had the parents signed the form on Elizabeth's behalf, since this would exonerate her from the accusation of deliberate deception. Alternatively, an appeal to the judge to make a special ruling on compassionate grounds might have been possible. Although this case, involving a child, a disabled woman and grounds for a compassionate ruling, seemed to Ana worth fighting both on a personal level and for its legal intricacies and its potential for setting legal precedents, in her view SWLLC was now too financially stretched to take on cases likely to be financially 'risky'. There was a chance that LSC funding would not be forthcoming where the chances of success were low.

Facing similar pressures, many private law firms have given up immigration and asylum work (this may, in some cases, have been in the interests of the intended 'efficiencies', see above). But the 40% success, or 'merit', test is also ignored by other solicitors, who trust that their more difficult cases will be outweighed by the easier ones. Law centre case workers may use such a calculus, too: Ana had earlier won an appeal in an asylum case which, although distinctly 'risky', was deemed worth undertaking by the SWLLC, given her (and its) prior success rate. Within advice-giving institutions broader success rates thus facilitate some discretion in taking on more risky cases, making some cross-subsidization possible.

There are, then, ways to resist the pressures or reframe them, but the negative implications of the reforms are nonetheless considerable. People like Elizabeth may be faced with 'second class' justice, or even denied legal aid and so representation of any kind.¹ In this new atmosphere the few victories which *are* won increasingly appear as 'episodes of compassion [...] as privileged moments of collective redemption eluding the common law of their repression' (Fassin 2005: 375).

Ethical involvement, condemnation, or public debate?

Such victories offer one example of case workers' creative ways of challenging the new system in which they feel caught and by which they feel increasingly compromised. But what might anthropologists do to satisfy the ethical requirements of *our* profession? Would acting as a witness in tribunals, as barrister Kathryn Cronin suggested, be an effective way forward? Given the legal aid reforms, with their emphasis on value for money and their reduction of complex legal principles to a narrowly statistical calculus of success, such an approach might nonetheless still be of some worth, albeit only in those increasingly few cases which actually come to court.

During the period of our research, we observed an instance suggesting that such court hearings might however be increasingly unlikely, even in cases in which barristers *were* hired. One, judged by Law Centre personnel to be more 'complex' than a mere 'act of assistance' and to be deserving – because of its 'greater than 40% chance of success' – of being taken to the High Court, involved many hours of consultation followed by a long session with the barrister. Suddenly, however, the Home Office 'decided out of the blue to grant [...] asylum' to the

¹ Experience shows that this might result in people borrowing money they cannot afford to pay back in order to get poor quality assistance from a for-profit adviser, or to their settling for partial assistance from a pro bono source like the Bar Pro Bono Unit, or to their getting advice from the Law Centre for which they are then unable to claim. Such pro bono work would then ultimately lead to financial difficulties for the Centre.

applicant. This move was viewed with considerable cynicism by the case worker, given its effect: to prevent the 'separate'/second-class system of justice (for asylum and immigration applicants) from being tested by the principles of 'mainstream' justice. Given the possibility that the Law Centre would not now be reimbursed for many of the hours spent thus far, the case also created considerable anxiety with regard to funding. Such anxiety was not merely a matter of intensified pressure on caseworkers: several of the Law Centres were forced to close and others were teetering on the brink of closure during the period of research.⁹

Another possible – and well-worn – position for the anthropologist is that of providing a critical reflection on those aspects of 'neoliberal governmentality' revealed by the UK's law reforms. Scholars analysing asylum processes and deportation hearings, mostly in the US, have issued harsh judgment, showing how such processes mould prospective incomers into conformity with models of desirable citizenship (Coutin 2003) or definitively 'illegalize' them by providing an opportunity to stage 'the spectacle of the illegal alien' (de Genova 2002). The two are refractions of each other, producing each other simultaneously, as can be seen from the case of Elizabeth. While her attempts to reunite with her daughter, if successful, would have positioned her as a 'normal' citizen with a regular family life, her past deception was unbecoming of such a status and her possible future as welfare beneficiary would likewise disqualify her.

One might be condemnatory of other aspects of this reform beside the coercive attempts by powerful states to shape vulnerable people pleading for inclusion. What has been decried, by caseworkers, the press and other involved parties, is the assumption behind these reforms that it is appropriate to use a 'market-driven' approach for what would normally be a state-funded project. In a process not unlike that applied by New Labour to the health service (Pollock 2005), consortia of Law Centres, Citizens Advice Bureaux or solicitors will be forced to 'tender' competitively for a package of work in a given territorial locality. This proposal prompted a sharp query from Des Hudson at the 2007 Law Centres Federation conference, concerning the future 'competitiveness' of such an arrangement. If one single contract of three or four years' duration is awarded in, say, Manchester, what would be the likely situation of the losing bidders when the matter was put out to tender next time round? What work might they have done that would enable them to bid competitively on the second bidding round? The laudable-sounding aims of the reforms are to enable sustainability and to cut waste, but the regrettable effect – after a single episode of market-based 'competition' – will be to replace expertise with low-paid 'Mcjobs', while producing enforced self-regulation.

What distinguishes these law reforms from those affecting the health service, however, is the peculiar character of the British legal system. Des Hudson, Chief Executive of the Law Society, described this in a discussion on BBC Radio 4's legal issues series *Unreliable evidence*:

When you continue to have an adversarial system as the means of delivering justice, the fact that three quarters of the population in this country are deemed ineligible for legal aid creates [...] a real worry about how well this system will deliver justice. [...] The importance of making sure it works is paramount, those losing out will be the unvoiced. It is about the quality of our society and the democratic processes. (5 December 2007).

In contrast to the US with its public defender's office, or France with its inquisitorial system in which the magistrate is required to do much of the gathering of evidence, access to justice in Britain is dependent upon either side having access to excellent legal advice and representation, and this requires money. The SWLLC's Chief Executive expressed similar sentiments:

If I am a person with unlimited means, I can pay to have my day in court. This, in theory, is paralleled by the public/legal aid system [...] the difference is that, under the new funding regime, we will only take your case on if we judge your case to be likely to win. Thus the underlying assumption is unfounded. If you went to the

LSC and asked ‘are clients getting as good a chance under not-for-profit as they would if they had means?’ the answer would be ‘no’ – even though the case workers have excellent skills.

Opinions such as these might be deemed unduly utopian. Surely, it might be argued, legal aid has never been able to give its clients ‘as good a chance’ as is afforded to people with unlimited means. Nonetheless, views of this kind make it possible to enunciate and discuss the principles, if not the practice, underpinning justice and democracy. The ideal of equal access to justice for immigrants and asylum seekers is here put into the public domain, debated, and reasserted.

Conclusion

For anthropologists, neither the giving of expert witness testimony nor the provision of an ‘outsider’s’ critical perspectives need be unuseful. But where one is perhaps too engaged, the other is too little so. Our intention in undertaking this collaborative research project was to occupy a place in the middle ground. We wanted to investigate the day-to-day realities of caseworker/client interactions, and to enable both ourselves and legal practitioners, in conversation, to reflect on our own and each others’ interpretations of the situation. Such conversations occurred on several occasions: during a feedback workshop, again when one of us presented our findings at the Law Centres AGM, and finally when case workers and the Chief Executive offered their comments on the present article.

We hope to continue our dialogue through future collaborations: it is by exploring the detailed practices and attitudes of those affected by such funding cuts, by engaging in and contributing to public debates, and by bringing these matters to the attention of a wider public, that anthropologists engaged in collaborative research projects can perhaps make some small difference. ●

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1. For example, see the blog on the topic of immigration/migration on the website of the Association of Social Anthropologists (ASA) (blog.theasa.org).

2. See <http://press.homeoffice.gov.uk/press-releases/new-rules-foreign-students>.

3. See Abrahams 2000; <http://petitions.number10.gov.uk/Overseasstudent>

4. *The Guardian* 10 March 2008 (<http://www.guardian.co.uk/commentisfree/2008/mar/10/justice.law>).

5. Names have been changed.

6. Carolyn Regan, *Unreliable evidence*, BBC Radio 4, 5 December 2007.

7. Fieldwork for this article was mainly conducted with caseworkers and their clients in various offices of the South-West London Law Centres, a non-profit organization that offers legal advice on a variety of issues including immigration and asylum.

8. <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part8/children/>

9. Tracy Cook, ‘Timed out’, *The Guardian*, 8 August 2007; Madeleine Bunting, ‘Labour’s handling of legal aid makes a mockery of its rhetoric on fairness’, *The Guardian* 10 March 2008.

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